

## Focus: current issues in medical ethics

### Law and medical ethics

David A Frenkel *Ministry of Health,  
Jerusalem, Israel*

*The relationship between law and ethics is possibly one of the most controversial subjects in any country all over the world. Dr Frenkel looks at some of the problems raised and relates how they would be treated in Israel under the law and ethical guidelines of the present time. He concludes by stating that, in his opinion, where the patient's body and integrity are not touched upon then statutory law may possibly take precedence over the rules of medical ethics. However, where the patient becomes the victim because domestic statutory laws are in opposition with medical ethics, Dr Frenkel feels that medical practitioners should stand by their professional codes and persuade the legislators to adapt theirs to the laws of humanity and public conscience.*

### Introduction

One of the possible controversial subjects is the interrelationship between law and ethics. From early times, groups of people of the same profession, and the medical profession has been no exception, have imposed upon themselves rules of professional ethics. These rules governed them in practising their profession.

Ethical standards of professionals often exceed those required by law. A physician charged with alleged ill-conduct may be acquitted or exonerated in criminal or civil court proceedings, yet disciplinary proceedings may be initiated against him with reference to the same conduct on the ground that his conduct was unethical.

It is rather difficult to define what exactly is meant by 'medical ethics'. The term is usually interpreted broadly to mean the moral, as opposed to legal obligations of a medical practitioner in the practice of his profession.<sup>1</sup> However, such distinction is not exact, as some of the standards known as medical ethics have legal effect.

Any medical practitioner may have his name struck off the register, if he is found guilty of 'infamous conduct'. 'Infamous conduct' was defined

in 1894 by the Court of Appeal in England as doing something with regard to one's profession which would be reasonably regarded as disgraceful or dishonourable by the professional brethren of good repute and competency.<sup>2</sup>

When there is a code or any rules of ethics, approved or recognised by the local medical association, then any violation of such a code or rules may be regarded as an 'infamous conduct', as decided in 1955 by the Supreme Court of Massachusetts.<sup>3</sup>

No problems exist when such a code or rules of ethics and the statutory law of the country may complement each other. A dispute may arise, however, when the medical ethics and the law are not in full accordance, especially when such rules of ethics are declared and recognised around the world.

The question in such cases is what should take precedence: the rules of ethics or the domestic legislation. In this paper we will deal with four such cases and try to draw some conclusions. These four are: professional secrecy, experiments on human beings, participation of medical practitioners in torture of human beings, and abortion.

### Professional secrecy

The relationship between a medical practitioner and his patient is one of special confidence. This principle is stated in both the Hippocratic Oath and the Declaration of Geneva, as well as in the national and local codes of ethics.

This secrecy is essential to enable the medical practitioner to obtain from his patient or for him all the necessary information for proper treatment.

This duty of secrecy is also legal. Violation of that rule by divulging any fact to any other person, without consent, may render the medical practitioner liable to an action for damages, either for breach of contract or defamation,<sup>4</sup> or for negligence when such information, disclosed, might come to the patient's knowledge and be likely to cause him harm.<sup>5</sup>

In Israel, such a duty is found also in section 496 of the Criminal Law 5737-1977. This section states that any person who has been entrusted by reason of his profession or occupation with secret information and discloses such information, save when he is required by law to do so, has committed a criminal offence.

No code of ethics makes any specific exception to this rule, yet statutory provisions impose certain such exceptions.

One exception which is found in many legislations is related to infectious or communal diseases. In Israel, for example, the law compels each medical practitioner who treats or visits a patient with an infectious disease listed by the Minister of Health, to report it immediately to the District Medical Officer,<sup>6</sup> and each ship's doctor is compelled to report diseases occurring on his ship, as soon as he enters a port.<sup>7</sup>

Another exception is found in Israel in Defence Service Law (New Version), 5719-1959. The Minister of Defence is empowered to compel physicians to disclose to a calling-up officer, if he himself is a physician, medical details which are necessary to determine the fitness of a candidate for military service.

A third exception is given by the law of evidence. Most legislations recognise the medical secrecy privilege, but at the same time it is stated in law that such a privilege exists unless the Court has found that the necessity to disclose the evidence for the purpose of doing justice outweighs the interest in its non-disclosure.<sup>8</sup>

The question of the right of a physician to give such evidence arose before the Supreme Court of Israel for the first time in 1973.<sup>9</sup> The petitioner was a gynaecologist in private practice. Suspecting that he was guilty of income tax evasion, tax inspectors acting by virtue of a search warrant entered his premises and seized his patients' files. His objections prevented the examination of these files, pending a decision by the Supreme Court as to whether these files constituted a privileged medical secret. For tax purposes, physicians are required to give receipts for every fee received and to keep a record of the date of every treatment, the name and address of each patient, and the amounts paid by him. The tax authorities suspected that the petitioner had failed to record certain receipts.

The court rejected the petition. It said that since the tax authorities were undeniably entitled to examine these records there was no reason to object to their inspecting the parallel entries in the patients' files. Judge Cohen even went further and declared, 'Where the law imposes a duty to disclose, no ethics which forbid the disclosure can prevail'. Judge (now Chief Justice) Sussman gave two reasons for rejecting the petition:

- 1) Where there are reasonable grounds to believe that a crime has been committed, the patient's right to secrecy must give way.
- 2) The rejection of the petition would not in this case result in public disclosure since the staff of the income tax administration is subject to a statutory duty of secrecy.

Another question is whether the duty of secrecy overrides public interests. A bus driver who is an epileptic may serve as an example for a person who may endanger the public if he continues his occupation. If the patient does not give his consent for disclosure of his medical state to his employer or to the licensing authorities, the medical practitioner may find himself in an embarrassing situation, for if he does not disclose, many lives may be in danger. If, however, the medical practitioner decides to disclose that patient's medical state, after he was unsuccessful in getting the patient's consent, it is most unlikely that he would be held liable for doing so in the case of any action being subsequently brought by his patient, on the condition that he did it in reasonable and good faith.

On the other hand, without specific legislation relating to the medical professions, any general provision which may compel disclosure of information about a felony having been committed, may not apply to medical practitioners. There would be a defence to this offence if there were a duty to keep the information confidential.<sup>10</sup>

Our society puts pressures on the medical practitioners to provide all sorts of bodies, governmental and public, such as the police, as well as private, such as insurance companies, with confidential medical information. In such cases the rule ought to be quite clear. A medical practitioner may not disclose any such information to any third party, without the consent of his patient, unless the law forces him or permits him specifically to do so.

We can see, therefore, that in the matter of professional confidentiality and secrecy, statutory law may take precedence over ethical rules.

### **Medical experiments on human beings**

As to medical experiments on human beings, the situation is different.

The Military Tribunal in Nuremberg rendered a judgment on 19 August 1949, at the 'medical case', in which it laid down standards to which medical practitioners should conform when carrying out experiments on human beings. This code was designed to restate existing general principles accepted by all civilised nations, and as such overrode domestic legislation. A medical practitioner who violates such world accepted rules of ethics cannot defend himself by alleging that his national law permitted him to act otherwise.<sup>11</sup>

Seventeen years later, in 1964, the World Medical Association adopted the Declaration of Helsinki in its 18th Assembly. This Declaration deals with clinical research, and seems to come to replace the Nuremberg Code. In its introduction it states that 'doctors are not relieved from criminal, civil and ethical responsibilities under the laws of their own countries'.

One may argue that the intention was not to discharge medical practitioners from any responsibility under their domestic statutory laws, when such laws demand higher standards and impose more strictures and limits than the Declaration does. But such an interpretation is not clear cut. It is possible at the same time to argue that out of this introduction one can learn that domestic legislation does take precedence over the rules drafted in the Declaration. The following matter may serve as an example.

In order to determine fitness for military service, some clinical research may be conducted. These researches are non-therapeutic in their nature. According to the Nuremberg Code as well as to the Declaration of Helsinki, such clinical researches may not be conducted without the consent of the human-subject. In some countries the law imposes on the subject the consent, and refusal to consent may be considered to be a criminal offence. Yet, in cases when such diagnostic activities may be dangerous, and do not result in effective therapy, they are prohibited by most codes of ethics including the Declaration of Helsinki. Will the medical practitioner be bound by his civil responsibility to carry out these diagnostic activities? If he refuses he may be found to be violating the law of his country. If he conducts them, he may be found to be violating those world accepted rules which are based on the laws of humanity and the dictates of public conscience.

### Participation in torture

Another case is the participation of medical practitioners in torture. There is evidence that medical practitioners in various parts of the world have participated in torture. Their participation is not only by examining victims before, during or after torture in order to pronounce on their fitness to undergo it, but they are asked to resuscitate victims who have collapsed, in order to continue the torture. Sometimes medical practitioners have also collaborated in devising methods of breaking resistance to interrogation.

The supreme duty of the medical professions is to heal patients and to refrain from injuring them.

Doctors employed in armed forces, in prisons or in internment camps are those most likely to face that ethical problem. They carry out these practices because they are ordered to do so by law, and not to be seen letting down their countries or the authorities who order them to do it. If they refuse to torture prisoners, while they themselves are soldiers or police officers, they may be severely punished.

Can anyone say that in such cases doctors should obey their domestic statutory laws rather than the world accepted rules? To my mind the answer should be – No!

In cases when a conflict exists between law and rules of medical ethics, the law should override, but in cases where life or health of a human being is in danger, no man-made law should have the power to override world accepted rules of humanity which aim to keep the human being as a supreme value. Any other view may lead to the situation which was followed by the Military Tribunals in Nuremberg.

### Abortion

A border-line case is abortion. Many domestic laws today permit abortion upon the request of the mother. The medical practitioners do carry them out by virtue of the permission granted by law.

On the other hand, both the Hippocratic Oath and the Declaration of Geneva prohibit abortions. The question is how may a medical practitioner violate the Oath he has taken notwithstanding the permission given by law. One may argue that the Hippocratic Oath and the Declaration of Geneva are not codes of ethics, but only a compilation of rules of etiquette. However, one should not forget that while codes of ethics, though broadly accepted, are sometimes imposed on the individual physician, the Oath is taken by each one individually. A breach of faith may be caused when physicians are allowed to ignore their own Oaths.

All those who deal with formulating doctors' oaths, as well as the physicians themselves, should take this into consideration.

### Summary

Summarising the interrelationship between law and medical ethics, I would say that in cases which do not touch the patient's body or integrity, such as professional secrecy, statutory law may take precedence over rules of medical ethics. But in cases where the human subject becomes a victim because of domestic statutory laws which are in contradiction with medical ethics, the medical practitioners should insist on adhering to their professional standards in such a way that the legislators will have to adapt their legislations to the laws of humanity and public conscience.

Legislators, as well as medical practitioners, should not forget that the term 'being' is preceded and qualified by 'human'.

### References

- <sup>1</sup>Burton, A W (1971). *Medical Ethics and the Law* Sydney, Australian Medical Publishing Co, p 13.
- <sup>2</sup>*Allinson v General Medical Council* (1894) 1 Q.B. 750, 763 (C.A.).
- <sup>3</sup>*Forziatti v Board of Registration in Medicine*, 128 NE 2d 789.
- <sup>4</sup>*Kitson v Playfair* (1896) As quoted at Burton, *supra* note (1), at p 30.

<sup>5</sup>*Furniss v Fitchett* (1958) NZLR 396.

<sup>6</sup>Public Health Ordinance, 1940, sec 12.

<sup>7</sup>Quarantine Regulations, reg 8.

<sup>8</sup>*eg* in Israel, Evidence Ordinance (new Version), sec 49.

<sup>9</sup>*Yismachovitch v Baruch et al* (1973) 27 (2) P.D. 253.

<sup>10</sup>*Sykes v D.P.P.* (1962) A.C. 528, per Lord Denning.

<sup>11</sup>Frenkel, D A (1977). Human Experimentation: Codes of Ethics, *Legal-Medical Quarterly*, 1, 7 *et seq.*